UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

UNITED PULSE TRADING D/B/A AGT FOODS and **BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS, INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 167G**	**Case 18-CA-242003**

TRIAL BRIEF OF UNITED PULSE TRADING

Comes now United Pulse Trading d/b/a AGT Foods (hereafter "AGT"), by and through undersigned counsel, and in addition to the testimony and evidence presented and accepted by the Court in the trial of the above captioned matter, submits this trial brief to further clarify and spell out the law on the issues.

BRIEF IN CHIEF

"Unfair if you do, unfair if you don't", Judge Millet's opening line from the Advanced Life Systems case, found at 16-1405 (DC Circuit 2018). AGT faced this dichotomy when they received the union's notice of Petition now one year ago.

During the hearing, Les Knudson, Division head of Ingredients operations, was called as a witness and stated that corporate discontinued annual reviews and all raises

across the board in 2018. A full year prior to any notice of union activity. He further stated that he went to bat for a few employees to get them some increase that year, as otherwise they likely would have left. These people were exceptions to the new rule, numbering thirty percent of the bargaining unit workforce.

Les provided graphed information and raw data showing the times between raises and raise amounts for all bargaining unit employees for the past few years. Multiple employees show no review or and no raise for more than 1,000 days. Lots show times from the last evaluation or raise in excess of 500 days. These documents were admitted into evidence and made a part of the record. The number of such employees is exceptional, in light of the substantial turnover in the plant.

AGT, per testimony, knew not only that they could not change any wages, benefits or working conditions during the time of the union campaign, but was well aware of the duty to continue on the patterns and practices in place prior to any union activity. But such practices must be established in such fashion as to be a regular part of the fabric of employment there.

Phil Waltz, an employee of several years subpoenaed by the NLRB to testify, validated that AGT had no actual consistency of annual raises or reviews. He stated that as much were very inconsistent, and that the only one he had was a supervisor walking by him in the hall and telling him he was going to get a raise. Employee Brady Betterly, also subpoenaed by the NLRB said AGT was horrible at giving raises and reviews. He said the practice of same at AGT was all over the place and totally inconsistent.

Quoting **Daily News of Los Angeles v. NLRB**, 73 F.3d 406, 412 n. 3 (D.C. Cir. 1996). if an employer "retains total discretion to grant [wage] increases based on any factors it chooses], we doubt that discontinuing the policy [will result] in a violation of section 8(a) (5)." Indeed, wage increases that "are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectations and thus are not considered 'terms and conditions' of employment. **" Phelps Dodge**, 22 F.3d at 1496. See also Daily News, 73 F.3d at 412 n. 3 ("we do not believe that fixed timing alone would be sufficient to bring the program under Katz").

So, if fixed timing alone is not sufficient to trigger the establishment of a pattern and practice, so must be the lack of any fixed timing mandate the matter falls below the threshold of establishment of a pattern and practice.

In **Ithaca Journal-News, Inc**., the NLRB found that merit increases given to employees were entirely discretionary because the timing, amount and selection of employees to receive the increases had not been determined in any consistent manner. 259 NLRB 394, 395 (1981). Of the thirteen employees eligible for an increase, ten employees received one increase and three employees received no increase. Id The following year, of eighteen eligible employees, two received two increases, nine received one increase, and seven received no increases. As to the timing of these raises, most took place in June, but a significant amount was spread out in other months.

To make that math easy, in one-year 77 percent of the Ithaca employees received raises, in the second year only 61 percent. In the two years prior to union activity (2017

and 2018), 60 percent of all eligible people AGT received raises, while in 2018 only 30 percent did. So, comparing AGT to Ithaca, on its best year AGT was 17 percent less effective at giving raises, and on it's worse year, less than half. Yet in the Ithaca case, the NLRB agreed there was no pattern established.

In both the Daily News of Los Angeles case and **NLRB V. Katz,** 369 U.S. 736, much discussion is given to determination of whether the company does in fact have an established practice as to date for giving raises, and then for the amounts tendered. Under the holdings in both cases, AGT fails to rise to the level required for the establishment of a pattern and practice. AGT gave raises anywhere from two weeks to in excess of 1,000 days from hire/start date and everywhere in between. Les Knudson stated that it had been the intent of AGT to provide regular evaluations and raises, but that just never happened. In fact, the statistics show they were late 84.72 percent of the time to give 90-day evaluations and raises, and late 80 percent of the time to give any yearly evaluation or raise. The only consistency here is they were inconsistent. No where in case law is found a basis to hold the company in violation of the NLRA for intent. Actual past practice is the ruler by which all such actions are to be measured.

Not only does one find inconsistency as to when reviews and raises are given, but there is a wide range of raise amounts provided. According to the exhibits and testimony offered at trial, raises range from nothing to $6.00 per hour. There again is no consistency as to amount given or when these raises take place.

In the case of **Acme Die Casting v NLRB**, 93 f.3D 854 (D.C. Cir 1996), the US Court of Appeals on the first of two occasions the case was presented sent it back down for the NLRB to indicate a rule whereby it could be determined if a pattern of wage increases was sufficiently regularly timed and of an amount to constitute a settled employment practice. The NLRB failed to so clarify, and the DC Court refused to enforce that portion of the order. The Court of Appeals stated "

"The Board has not demonstrated a comprehensible standard for deciding whether a pattern of increases is sufficiently consistent in timing and/or amount to constitute a settled practice." 26 F.3d at 166. Observing that its precedent on this issue was "all over the map," it was remanded to allow the Board to craft a rule that "set the parameters governing when the frequency and the amount of wage increases is sufficiently consistent to constitute a settled practice." Id

The Court further noted "the Board's perspective seems to shift from case to case. Predicting whether the Board will view a pattern of wage increases as established or discretionary has proven difficult not only for employers and employees, but for the Board's own ALJs as well. In many of the Board decisions cited in Acme, the Board overruled the ALJ's findings that an employer's wage increases were sufficiently regular to constitute an established practice. See Orval Kent Food Co., 278 N.L.R.B. 402 1986 WL 54103 (1986); Ithaca Journal-News, Inc., 259 N.L.R.B. 394, 1981 WL 21026 (1981); Great Atlantic & Pacific Tea Co., 192 N.L.R.B. 645, 645-46 (1971).

The Court expressed frustration when the Board failed to either provide the rule establishing the difference between settled practice and sporadic events as requested, or to even to explain why it was failed to do so. Even the ALJ in that matter acknowledged the case was on the borderline of a settled practice and sporadic one.

Thirty percent of AGT bargaining unit employees received raises during the calendar year of 2018 (this excludes qual cards and 90-day reviews). 30 percent of all such eligible employees. Seventy percent did not receive raises in 2018, the year prior to the filing of the petition (February, 2019). Would the NLRB have AGT count on that thirty percent to establish pattern and practice, or go with the 70 percent that did not? Is the safe harbor to go with the mountain or the mole hill? An Unfair Labor Charge with merit would have been filed had AGT given the evaluations and raises, with an election pending, in light of the fact that only 30 percent had received evaluations and raises the year before. When you consider the uncontested facts that AGT ceased formal raises in early 2018, thereafter giving only a few, could a valid argument be made that there was a longstanding pattern and practice of such? In the research done in preparation, no case is more on point than the Advanced Life Systems case previously cited.

Additional evidence of the awareness and desire of AGT to act in conformity with the NLRA can be found by looking at the qual-card program. Established years ago, it is a means by which employees gain raises and hourly increases by obtaining greater skill sets. This is an established means of employees obtaining more money at their own pace and at their own initiative. Because of its long-standing establishment and practice and known increase amount, qual cards are a practice undeterred by any other events taking

place with AGT. Les testified they knew this to be a program they could continue and be within their rights. AGT applied the same test and standards used to decide annual raises and reviews could not be reinstated, while the qual card program must continue.

Again, quoting Judge Miller in the **Advanced Life Systems** case, "Unfair if you do; unfair if you don't". Advanced Life new hires were told at hiring they could expect periodic pay raises on the anniversary of their hire date but those informal predictions rarely, if ever materialized, and occurred at "highly irregular intervals between 2 weeks and 22.5 months. The amount of any pay raise, even for the same employee, was equally unpredictable, with per hour increases ranging between 25 cents and $2.50." No indication is found of a logical pattern or discernible nexus as to the timing or amount of any pay raises. The starting assumption, then, is that Section 8(a)(5) required Advanced Life and all others similarly situated to freeze pay increases until it could negotiate them with the Union.

As this is law, an exception does exist. If the employer has a "longstanding practice" of awarding the same "automatic increases" or bonuses, **Katz**, 369 U.S. at 746, at "fixed" and "regular intervals," **Acme Die Casting v. NLRB**, 93 F.3d 854, 856—857 (D.C. Cir. 1996), the continuation of those payments is permitted. More than that, the failure to continue making the payments could be construed as evidence of discrimination against the employees' exercise of their unionization right, which is itself an unfair labor practice under Section 8(a)(3), 29 U.S.C. § 158(a)(3). See **Katz**, 369 U.S. at 746.

Unlike Section 8(a)(l), violations of Section 8(a)(3) require proof of the employer's anti-union motive or animus. Specifically, to establish that an employer has discriminated against its employees' exercise of their Section 7 right to collective activity, the General Counsel must show that an employer took adverse action against an employee, "at least in part," because of that employee's union involvement. **Matson Terminals, Inc. v. NLRB**, 1 14 F.3d 300, 303 (D.C. Cir. 1997); see **Arc Bridges, Inc. v. NLRB**, 861 F.3d 193, 198-199 (D.C. Cir. 2017). To establish a prima facie case of discriminatory motivation, the General Counsel must show that the employer knew of the employee's union activity and acted in response to it. See **Wright Line**, 251 NLRB 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981); see also **NLRB v. Transportation Mgmt. Corp**., 462 U.S. 393, 401—403 (1983) (approving Wright Line test).

The Court held in the Advance Life Systems case that substantial evidence of the required discriminatory motive was blatantly absent, because the essential predicate of the General Counsel 's claim—that Advanced Life had the type of well-established and automatic practice of paying fixed amounts at predetermined intervals that would allow continued payment without violating Section 8(a)(5)'s duty to bargain is missing. Katz requires that past wage increases present a recognizable pattern establishing who will receive a raise, when it will occur, and how much that raise will be. See 369 U.S. at 746-747.

Do remember, the record in the Advanced Life case revealed pay raise intervals as short as two weeks or as long as 22.5 months. The amount of each increase was just as uneven and unpredictable, ranging from 25 cents, to 50 cents, to $1.00, to $2.50 per hour.

Quoting the Court "In short, on this record, the only discernible constant is the inconstancy of both the timing and amount of pay increases". Justice Millett stated that the ALJ "painted a bullseye around the arrow to come to the conclusion that there existed a pattern or practice of raises or amounts.

"The question under Katz is not whether numbers could be averaged in hindsight, but whether a "long-standing" practice of predetermined payments to individual employees was so ingrained in the workplace as to lead to "automatic wage increases" for individual employees. **Katz**, 369 U.S. at 746; see **Daily News of Los Angeles v. NLRB**, 73 F.3d 406, 412 n.3 (D.C. Cir. 1996) (expressing doubt that simply awarding pay raises at fixed intervals would alone be sufficient to bring them within the Katz exception); **Acme Die Casting**, 93 F.3d at 857 (finding that discretion over timing or amount will exclude past raises from the existing terms and conditions of employment)."

The Court opined that no individual employee could have felt assured of any raise or increase taking place, or feel said increases were locked in going forward. Even the ALJ in the matter acknowledged the timing and amount of each raise, including those falling within the purported pattern, depended on discretionary variables like performance.

Again quoting "Because pay increases were "in no sense automatic, but informed by a large measure of discretion," Advanced Life could not implement them unilaterally and, instead, Section 8(a)(5) required it to negotiate "the procedures and criteria for determining such increases." **Katz**, 369 U.S. at 746; see also **Daily News**, 73 F.3d at 412 n.3 ("[If] the Company retained total discretion to grant the increases based on any factors it chose, [a unilateral change] would [not] have resulted in a violation of section 8(a)(5) even though the raises had been awarded annually[.]"). For that reason, Advanced Life's declination to make the pay increases—a decision required by Section 8(a)(5)—cannot be treated as a violation of Section 8(a)3.

Here, as in Advanced Life, the NLRB would apparently have one reach the conclusion of anti-union animus found somewhere in the statement's forthcoming from Les and or the actions of AGT. Yet listening to the statements and viewing the actions, Les stated fact, not anti-union bias and nowhere is any conduct found that is anti-union. The Court in Advanced Life felt it "too thin a reed on which to hang a finding of antiunion animus." This finding was based on the confusing questions of legality surrounding Advanced Life's ability (or not) to continue such payments. Finding that under the circumstances, "suspending pay increases could have equally evidenced the legally required respect for the employees' and the Union's bargaining rights. All the Board demonstrated here was that no good deed goes unpunished."

The situation of AGT is an almost direct mirror of the Advanced Life Systems case. We are actually worse than they were for giving raises, as evidenced by the exhibits entered and testimony taken. If the D.C. Circuit Court found a lessor offender of annual and systematic raises to not be in violation of the National Labor Relations Act, how can anyone find AGT now in violation?

Respectfully submitted,

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